BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE: [redacted],	)	
Petitioner,	)	
vs.	)	**No. 01-56**
LEWIS COUNTY SCHOOL SYSTEM,	)	
Respondent.	)	

FINAL ORDER

Howard W. Wilson
Administrative Law Judge
6 Public Square, North
Murfreesboro, Tennessee 37130

Parents (Per se)

[redacted]

Attorney for School District
Mr. John D. Kitch, Esquire
2300 Hillsboro Road
Suite 305
Nashville, TN 37212

[To protect the confidentiality of the minor student, [redacted] will be referred to as "J" on all remaining pages of this decision]

FINAL ORDER
CASE NO.: 01-56

A Due Process Hearing was requested by the parents, Mr. and Mrs. [redacted] on behalf of their minor daughter, "J". On October 11, 2001, the Division of Special Education, Tennessee Department of Education appointed this Administrative Law Judge to hear the case. A Pre Conference Order was issued on October 16, 2001. The 45-day timeline was waived by agreement of parties on December 3, 2001. The case was heard in Hohenwald, Tennessee on December 17-18, 2001.

I. Findings of Fact

J had problems with reading in the first grade and an evaluation was completed to help determine her exact problem. The student was placed at that time in a Chapter One program to assist her in reading. (Vol. 1, p. 23) As early as the second grade, J was already functioning behind the rest of the class in that J was at the first grade reading level while attending second grade. (Vol. 1, p. 25) In the third grade, J was diagnosed with ADHD by Dr. Patricia Davis. (Exhibit E) The Fourth Grade IEP showed J to be reading at the third grade level. The student was making some progress but was behind her peers in the regular fourth grade class. (Vol. 1 p. 28, Exhibit G)

The parents during the fifth grade year removed J from special education classes "because she wasn't progressing and we were having all these problems too." (Vol. 1, p. 83) The student was decertified from special education with the parents' permission and agreement, and operated under a Section 504 plan for the sixth grade year. (Vol. 1, p. 86)

Mr. Mac McCarthy, Special Education Supervisor for Lewis County Schools appeared as an expert witness without objection from the Plaintiffs and testified he had reviewed J's educational records. From that review, Mr. McCarthy concluded that J did made educational progress during the 1997-8 (3rd grade), 1998-9(4th grade) and 1999-2000 (5th grade) school years. (Vol. 1, p. 100)

J had previously received special education services in the third through the fifth grades. (Exhibits F, G and H) Student was served on a Section 504 Plan for the 6th grade year. (Exhibit L) The student was certified on October 10, 2001 as "functionally delayed" under the Special Education regulations in Tennessee Rules, Regulations and Minimum Standards. (Exhibit T) J has a general intelligent quotient (I. Q.) of 66. (Exhibit P; Vol. 1, p. 65) Functionally delayed is looking at two different major areas, one of intelligence, the other is adaptive behavior. In order to qualify, a student must have an I. Q. that is in a range of mental retardation, but the adaptive behavior scales are not within that range or within a range higher than that. (Vol. 1, p. 110) Functionally delayed means that the child's adaptive behavior (the ability to get along in daily life) is higher than one would expect of a person with that particular intelligence capability. (Vol 1, p. 110)

An IEP was developed for J on December 13, 2001 with the appropriate participants in attendance. The IEP signed at this meeting was agreed upon in all parts including the goals and objectives for J. The parents disagreed as to who would teach J and where the instruction would take place. (Vol. 1, p. 120) From the testimony of school district expert witnesses, the IEP will provide a free appropriate public education in the least restrictive environment. (Vol. 1, p. 124; Vol. 2, p. 9; Vol. 2, p. 22-23; Vol. 2,

p. 30) Mr. McCarthy, an expert testifying for the school district stated in his professional opinion that the least restrictive environment for J would be with pull out resource services. (Vol. 1, p. 124) The student according to the IEP would be in 21.48 hours of general education curriculum and 13.51 hours a week in special education.

The student has been receiving tutoring from Sylvan Learning Center. (Exhibit V) The mother testified that Sylvan Learning Center made a guarantee that "in 144 of tuition that J would be caught up to within six months of her grade level in reading". When asked if J were not caught up to within six months of her grade level in reading, what would happen, the parent answered that they [Sylvan Learning Center] would provide free tuition until she is caught up. (Vol. 1, p. 55) The mother testified Sylvan Learning Center did a test for reading and not for I.Q. (Vol. 1, p. 57) and that she, the mother, never told the Center the student had a borderline IQ. The parent only told the Center, J had ADHD. (Vol. 1, p. 57)

The parents of J stated, "We don't feel that the school system has the adequate means to educate J. They have pretty much given up on her." (Vol. 2, p.33) Further, the parents said that they had previously tried resource for three years and it did not work. (Vol. 2, p. 34) The mother testified she thought the school system's IEP is a guarantee that the student will make a year of progress in every area in every year. (Vol. 1 p. 62) She went on to say it was her understanding that the school system failed if J did not gain a grade level each year J had an IEP. (Vol. 1, p. 64) The parent thought the student should gain a year's knowledge even though her daughter might not have the ability to do so. (Vol. 1, p. 64) Finally, the parent's opinion was that J's intellectual capabilities have nothing to do with how she performs. (Vol. 1, p. 70)

The parents would like to see that J comes to school every day and be successful. "J should have the right to graduate or at least have the chance to graduate like everybody else", according to the parents' statements. (Vol. 2, p. 34)

The school district called four witnesses who were each qualified as an expert witness. Each of these witnesses provided the Court with credible testimony. The Plaintiffs rebutted none of the testimonies. The unrebutted testimony of Ann Moore, Christy Ricketts, Diena Hill, and Mac McCarthy provided the Court with a clear understanding of the IEP, past evaluations, and expectations for J.

Mrs. Ann Moore, a school psychologist with Lewis County Schools was designated as an expert witness in school psychology without objection by the Plaintiffs. Mrs. Moore has served for more than eighteen years in this position. She conducted the educational evaluation of J and wrote the psychological report. (Exhibit 7). Mrs. Moore testified that the I.Q. scores of J would be described, "as falling in borderline range of functioning, which would indicate that this would be a student who would be expected to suffer significant delays in academics." (Vol. 2, p. 6)

Mrs. Moore further testified that she participated in the writing of the IEP and she believes the IEP is appropriate for J, in order to gain educational benefit. (Vol. 2, p. 8) The witness testified that the least restrictive environment would be in special education pull out resource for certain services. (Vol. 2, p 9)

Mrs. Moore testified that pull out services were appropriate for J because, the school is "looking at academic areas that involve a sequential building of skills in these subject areas, and if there is a significant gap between a student's functional ability in terms of academic achievement level and the level of instruction offered in the regular

program curriculum, it's virtually impossible for a student to be able to connect effectively with the level of instruction being offered and provided in the regular curriculum". (Vol. 2, p. 9)

Mrs. Moore testified without challenge from the Plaintiff, that the Section 504 Plan that J operated under for several months did not provide academic progress due to the child's disabilities. (Vol. 2, p. 9)

The school psychologist testified that early in the child's education experience the gap between her grade placement level and her achievement skills measured in individual testing was narrower than it currently is. In her early years, J appeared to be an overachiever in light of her range of cognitive skills. (Vol. 2, p. 10) However, "as the curriculum develops and instruction becomes more abstract and conceptually based, you are going to see then a widening of the achievement abilities between the average child and the borderline child", Mrs. Moore stated.

The expert witness was asked if some sort of reading tutoring program would be able to reach an achievement level that is perfectly commensurate with her chronological age. She replied, "No, that is not likely." This is due to "cognitive delays that are indicated by the intellectual range in which J functions separates her from her peer group, her average peer group, in terms of her ability to grasp concepts, to learn new skills; not only the rate, but the extent of the skills that she can learn. And, for that reason, I feel like, no, we are not looking realistically at being able to bring her to grade level functionally." (Vol. 2, p. 13)

Mrs. Christy Ricketts, a general education teacher endorsed in elementary education as well as special education was designated as an expert witness in both

general and special education, without objection by the Plaintiff. Mrs. Ricketts was J's teacher in the regular program of the elementary school during the Fall, 2001 when the Section 504 Plan was being implemented. Mrs. Ricketts testified that the student did not make any progress with the assistance of the Section 504 modifications. (Vol. 2. p.23. 27) Further, the expert witness, when asked to testify to the benefit of some pull out services, said J "would really excel in a small group setting and she would be working on a level closer to what she's capable of". (Vol. 2, p. 22-23) Mrs. Ricketts, stated she did not know J had previously been in special education. (Vol. 2, p. 26)

Mrs. Diena Hill, a seventh and eighth grade resource teacher was admitted as an expert witness and stated the IEP goal sheets were written to assist J. She further testified the goal sheets were appropriate and could be implemented through pull out resource services. (Vol. 2, p. 30) Mrs. Hill also believed that pull out resource services would be the "least restrictive environment" for J. (Vol. 2, p. 31)

II. ISSUES

1. Is the proposed IEP appropriate for J.?
2. Is the IEP placement (pull out resource) proposed by the school district appropriate for the implementation of the goals and objectives of J's IEP and in compliance with the terms and provisions of the Individuals with Disabilities Education Act (hereinafter "IDEA")?
3. Is J entitled to receive tutoring services from Sylvan Learning Center at school district expense?

III. CONCLUSIONS OF LAW AND DISCUSSION

The Court will first address the issues from a Section 504 standpoint and then review the issues under the Individuals with Disabilities Education Act legal standards. Section 504 of the Rehabilitation Act of 1973 (hereinafter referred to as "Section 504") is a civil rights act, which forbids pubic school districts from discriminating against students who are disabled due to the student's disability. Further, Section 504 requires schools to provide accommodations for students who are qualified under the Act. Section 504 is not as comprehensive as the Individuals with Disabilities Education Act when it comes to establishing specific criteria for school districts to follow when providing services to students with a Section 504 Plan for accommodations and modifications. Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more major life activities, or if they have a record of or are regarded as having such impairment. [34 CFR 104.3(j)] Section 504's Free Appropriate Public Education standard requires schools to provide services designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met. [34 CFR 104.33(b)(1)(i)] Students who qualify under Section 504 are provided accommodations and are implemented through a plan written by a group of people who are knowledgeable about the student. Section 504 also has a Least Restrictive Environment requirement (34 CFR 104.34), which requires students to be served in their regular education classes.

J was determined to be eligible for Section 504 accommodations in November 2000. The parents agreed to participate in writing a Section 504 of plan for J. The plan was written to allow J to participate in her regular education classes. The District met

their obligations under Section 504 in evaluating the student, writing a plan for accommodations, and implementing the plan in the regular education classroom. However, the plan was not adequate for the student due to the extent of the child's disabilities. Expert witnesses testified that the Plan was implemented appropriately but the student was unable to be successful even with the accommodations due to the student's disabilities.

The District complied with the procedural requirements of Section 504 and has not discriminated against J due to the child's disabilities. Further, the Section 504 Plan, which was written, conforms to the legal requirements of Section 504. This Court finds the school district to be in compliance with reference to Section 504.

With the school district being found in compliance with the Section 504 Accommodation Plan, the Court now will address the issues from an IDEA standpoint.

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs". 20 USC 1400 (1) (A) (Supp. 1998). A disabled child's right to a free and appropriate public education is assured by the development and implementation of an IEP. (Honig v. Doe, 484 U. S. 305, 311-312) The "centerpiece" of this "free appropriate public education" is the individualized education program ("IEP"), which is a collaboratively developed plan for a disabled child's education. [Reusch v. Fountain, 872 F. Supp. 1421, 1426 (D. Md. 1994)] A disabled child's parents must be included as part of the team that develops and reviews a child's IEP. [20 USC 1414(d)(1)(B)(i)]. "The IEP is supposed to be the joint product of discussions among the child's parents, teachers, and local school officials and must

specify goals and short terms objectives for the child, any related services, and the criteria and evaluation procedures that will be used." [Sanger v. Montgomery County Bd. of Educ. 916 F. Supp. 518, 519 (D. Md. 1996)] An IEP must contain both a statement of the child's "present levels of educational performance: and a "statement of the special education and related services and supplementary aids and services to be provided to the child. " [20 USC 1414(d)(A)(i) and (iii)] IEPs must be revised "not less than annually." [20 USC 1414(d)(4)(A)(i)]

The Individuals with Disabilities Education Act (IDEA) defines free appropriate public education as: special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state education agency, (C) include an appropriate preschool elementary, or secondary school education in the state involved, and (D) are provided inconformity with the individualized education program required under section 1414 (a) (5) of the Act.

In Board of Education v. Rowley, 458 U.S. 176 (1982), it was clearly established that the IEP according to law must be individualized to meet the unique educational needs of the child. The IEP is the primary vehicle through which disabled children are assured a free appropriate public education. In 20 USC 1401 (18) we are specifically informed that the IEP should include the following: (A) a statement of present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational services to be provided in regular education programs, (D) the projected date for initiation and anticipated duration of such services and (E) appropriate objective criteria and evaluation

procedures and schedules for determining on at least annual basis, whether instructional objectives are being achieved.

Rowley also instructs us, "the primary responsibility for formulating the education to be accorded a disabled child, and for choosing the education methods most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." In these types of cases, the Supreme Court in Rowley (at 192) established that the individualized educational program must be "reasonably calculated" for the child to "receive educational benefits."

The United States Supreme Court in Board of Education v. Rowley, 458 U.S. 176, 192 (1982), established that the individualized educational plan must be "reasonably calculated" for the child to "receive educational benefits".

The United States Supreme Court has held that in order to satisfy its duty to provide a free appropriate public education, a state must provide "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." [Board of Education v Rowley, 458 U. S. 176, 203 (1982)] The holistic impression from the testimony of school board employees, witnesses and the record was that the school district has written an IEP to provide FAPE to J.

It is also well settled law that although an appropriate education must confer more than a trivial benefit (Polk v. Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988), it is not required to maximize the child's potential. (Doe v. Board of Education, 9 F. 3d 455 (6th Cir. 1993). From the record, it is obvious that the IEP written for 2001-2002 more than meets the federal and state requirements for a compliant IEP.

As the Court in Rowley observed, it was the intent of Congress in enacting the IDEA that disabled children would be provided a basic floor of opportunity, but beyond this Congress did not impose any particular substantive standard the states has to meet. Rowley at page 200. All that is required by the IDEA is that the education provided by sufficient to confer some educational benefit to the child. Rowley at 200-01. While each child should receive an education appropriate to his unique needs the IDEA does not necessarily mean that every individual student' potential must be maximized. Rowley at 199. There is no requirement that guarantees a particular outcome for the child. See id. at 192. The Petitioner has failed to present any credible evidence to negate the testimony presented by the school district that the student would not receive a FAPE.

The Plaintiffs misapplied the law and court decisions when the mother testified that the school system's IEP is a guarantee that the student will make progress. This is contrary to basic tenets of the IDEA.

The Court now turns to the issue of the least restrictive environment (hereinafter referred to as "LRE"). The LRE requirement shows Congress's strong preference of educating the student in the regular education classroom when appropriate, LaGrange, 184 F.3d at 915, but does not require or even suggest, doing so when the regular classroom setting provides an unsatisfactory education. The Act's LRE provision requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled in regular classes with appropriate supplementary aids and services. [20 USC 1412(5)(B) and 34 CFR 300.550(b)(2)] Although the Act does not define the term "supplementary aids and services," any modifications to the regular educational program that the individualized education program (IEP) determines that the

student needs to facilitate the students placement in the regular educational program must be describe in the student's IEP and must be provided to the student. (Appendix C to 34 CFR Part 300, question 48) The regulations also provide that public agencies must make available a continuum of alternative placements to meet the needs of children with disabilities for special education and related services. (34 CFR 300.551) In addition to the options of this continuum, which must include the alternative placements listed in the definition of special education, the continuum also must "make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." [34 CFR 300.551(b) (2)] These alternatives listed in 300.551 must be available to the extent necessary to implement each disabled student's IEP. [34 CFR 300.552(b)]

The expert witnesses for the school district testified that J could not receive an appropriate education in the regular education classroom but would need pullout resource in order to be successful.

The parents want what is best for their child and obviously have become frustrated with the progress that J has made. A child who has limitations is not going to perform at a level of her peers, and the general education program is set up so that a seventh grader will do the seventh grade work and will do so with passing grades. A student who is not capable of doing seventh grade work along with her peers is not going to prosper in the general curriculum without substantial aids and services that can only be provided under the special education law, through the mechanism of an IEP.

IV. Conclusion

The program and placement proposed by the school system is "reasonably calculated to enable the child to receive educational benefits," Rowley, 458 U.S. 176 at 206-7, and in fact would provide educational benefit to the child. Therefore the program and placement is appropriate, and the school system has offered a free appropriate public education in the least restrictive environment. The School System is not required to contract with a private contractor (i.e. Sylvan Learning Center) to provide services to its students if it can provide the services with its own personnel. The IDEA provides:

> [T]his part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. 1412 (a)(10)(C). (1997)

Since the program and placement are appropriate, payment for Sylvan Learning Center cannot be ordered. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct 1996 (1985) For the reasons stated herein, the Court finds that the school district's recommended IEP and educational placement does not violate the IDEA but is appropriate for J.

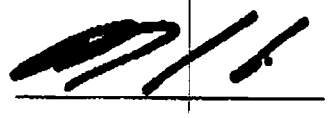
V. ORDER

1. It is herby ORDERED that the IEP is written in a fashion so that J can make educational progress.

2. It is further ORDERED that the proposed IEP is to be implemented for J.

3. It is further ORDERED that the pull-out resource class is the least restrictive environment for J to receive appropriate special education services.

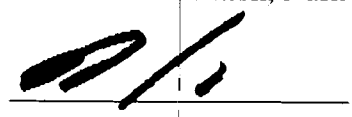
4. It is further ORDERED that the Lewis County School System is the prevailing party regarding all issues.



Howard W. Wilson
Administrative Law Judge
6 Public Square, North
Murfreesboro, Tennessee 37130

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 15th day of March, 2002 to the parents, Mr. and Mrs. [redacted] Attorney for School District, Mr., John D. Kitch, Esquire, 21300 Hillsboro Road, Suite 305, Nashville, Tennessee 37212; and to the Division of Special Education, State Department of Education, Nashville, TN 37243-0375.



Howard W. Wilson